IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

FRANCISCO DURAN GONZALES,
Appellant.

No. 2 CA-CR 2014-0410
Filed December 21, 2015

Appeal from the Superior Court in Gila County
No. S0400CR201300461
The Honorable Gary V. Scales, Judge Pro Tempore

AFFIRMED

COUNSEL

Mark Brnovich, Arizona Attorney General
Joseph T. Maziarz, Section Chief Counsel, Phoenix
By Amy Pignatella Cain, Assistant Attorney General, Tucson
Counsel for Appellee

Emily Danies, Tucson
Counsel for Appellant

MEMORANDUM DECISION

Chief Judge Eckerstrom authored the decision of the Court, in which Presiding Judge Vásquez and Judge Miller concurred.

E C K E R S T R O M, Chief Judge:

¶1 Appellant Francisco Gonzales appeals from his conviction for child abuse, a domestic violence offense. He contends the trial court erred in failing to supplement its jury instructions and in denying his motion for a judgment of acquittal, made pursuant to Rule 20, Ariz. R. Crim. P. Finding no error, we affirm.

Factual and Procedural Background

¶2 "We view the facts and all reasonable inferences therefrom in the light most favorable to upholding the verdict[]." *State v. Tamplin*, 195 Ariz. 246, ¶ 2, 986 P.2d 914, 914 (App. 1999). When L.G., then four years old, was living with an adult cousin, I., and her adult daughter, E., in Colorado, E. saw L.G. "forcing" E.'s son R.'s hands "down her pants." When I. and E. asked L.G. about what she had done, she told them, "My dad use[d] to do it to me." I. took L.G. to a pediatrician, and L.G. told the doctor that she hurts herself at times as well, explaining it was, "Because my daddy did naughty things to me."

¶3 After the doctor reported the possible abuse, Child Protective Services (CPS) took custody of L.G. During a forensic interview, L.G. stated that her "dad," "Francisco," had put his finger in her "butt" and "pussy," had touched her "boobs" under her shirt, had made her "suck his dick" and "white stuff" had come out, and had put his "dick" in her "pussy." She also stated he had made her watch "nasty movies" that included depictions of oral sex.

¶4 A detective from the Globe Police Department contacted Gonzales in November 2013. Gonzales informed the detective that he had been L.G.'s primary caregiver for most of her life. But L.G. had lived with various relatives, including her mother, both before and after Gonzales went to prison in 2012.

¶5 Gonzales was charged with one count each of child abuse, continuous sexual abuse of a child, and furnishing harmful items to minors. The jury found him not guilty of continuous sexual abuse and furnishing harmful items to a minor, but guilty of child abuse. The jury also found "not proven" two aggravating factors—"physical, emotional or financial harm" to the victim and "[d]efendant abused his own small daughter." The trial court imposed an enhanced, "slightly mitigated" prison term of 8.5 years. This appeal followed.

Rule 20 Motion

¶6 Gonzales contends the trial court erred in denying his motion for judgment of acquittal, made pursuant to Rule 20. A court shall grant a Rule 20 motion only when no substantial evidence supports a conviction. Ariz. R. Crim. P. 20(a); *State v. Davolt*, 207 Ariz. 191, ¶ 87, 84 P.3d 456, 477 (2004). Substantial evidence is present when reasonable people "[c]ould differ on the inferences to be drawn from the evidence." *State v. Sullivan*, 205 Ariz. 285, ¶ 6, 69 P.3d 1006, 1008 (App. 2003). On appeal, we review the evidence in the light most favorable to sustaining the court's decision and "resolve all inferences against the defendant." *Davolt*, 207 Ariz. 191, ¶ 87, 84 P.3d at 477.

¶7 In this case, the state was required to prove that Gonzales had, "[u]nder circumstances other than those likely to produce death or serious physical injury," intentionally or knowingly either "cause[d] or permit[ted] the person or health of the child," L.G., to be "injured" or "permit[ted]" her "to be placed in a situation where [her] person or health . . . [wa]s endangered" when he had care or custody of her. A.R.S. § 13-3623(B)(1).

¶8 The victim's statements in her forensic interview, described above, were sufficient to establish the statutory elements. Although Gonzales argues the defense witnesses "impeached the State's witness" with whom the victim had been staying at the time of the interview, this does not mean the evidence was insufficient. Rather, Gonzales's argument is a request for this court to reweigh the evidence presented, which we will not do. *See State v. Haas*, 138 Ariz. 413, 419, 675 P.2d 673, 679 (1983). Because when viewed in the light most favorable to the conviction there was substantial evidence from which a reasonable jury could find the elements of the offense established, we must affirm the trial court's ruling. *See State v. West*, 226 Ariz. 559, ¶ 16, 250 P.3d 1188, 1191 (2011).

Jury Instructions

¶9 Gonzales argues his due process rights were violated when the trial court "fail[ed] to supplement its original instructions with clarifying instructions" after the jury asked a question during deliberations. During jury deliberations, a juror questioned, "Can [Gonzales] be charged with child abuse for having left [L.G.] with her mother in Globe knowing she could be endangered?" The trial court discussed the question with counsel, and Gonzales suggested the court should tell the jurors "no" and instruct them that they could only consider "the facts . . . [and] the evidence that's before you" and "to quit speculating." The court declined to include anything about "speculating," but instructed the jury, "The jury can only deliberate [on] the evidence before it with the guidance of the jury instructions." Gonzales did not request further instruction, did not object to the instruction as given, and did not argue the jury's confusion would not be cured by the instruction given by the court.

¶10 Gonzales argues in his reply that his motion for a judgment of acquittal, in concert with the discussion noted above, was sufficient to preserve his argument for appellate review. The state, in contrast, argues Gonzales invited the error. But although Gonzales argued the jury had "come back with an inconsistent verdict" and asserted he did not "believe that the jury understood the evidence and the charge," he did not address the jury instructions specifically. *See* Ariz. R. Crim. P. 21.3(c) (party must

"stat[e] distinctly" the matter and grounds for objection). And in any event, even if his argument could be construed as an objection to the instructions, it would have been an untimely one. *See id.* (objection must be made "before the jury retires to consider its verdict"). We cannot say, however, that he invited the error, because, although the court adopted a portion of his requested supplemental instruction, it did not fully adopt Gonzales's view.

¶11 Because Gonzales did not object to the supplemental instruction on the ground he now raises, *see id.*, we review solely for fundamental error, *see State v. Henderson*, 210 Ariz. 561, ¶ 19, 115 P.3d 601, 607 (2005). To establish fundamental error, Gonzales must prove that error occurred, that the error "complained of goes to the foundation of his case" or "takes away a right that is essential to his defense, and is of such magnitude that he could not have received a fair trial," and that such error resulted in prejudice. *Id.* ¶¶ 23-26. A defendant has the burden of establishing that fundamental error occurred and that the error caused him prejudice. *Id.* ¶ 22.

¶12 "With regard to jury instructions, fundamental error occurs 'when the trial judge fails to instruct upon matters vital to a proper consideration of the evidence.'" *State v. Edmisten*, 220 Ariz. 517, ¶ 11, 207 P.3d 770, 775 (App. 2009), *quoting State v. Laughter*, 128 Ariz. 264, 267, 625 P.2d 327, 330 (App. 1980). However, even if fundamental error resulted from erroneous instructions, the defendant must demonstrate prejudice by showing that, had the jury been properly instructed, it could have reached a different result. *Id.* ¶ 18.

¶13 Gonzales claims that our case law "reveals a split of authority" in the civil and criminal arenas as to whether a trial court is required to provide additional instruction to a jury when it appears to be confused. But, contrary to his argument, our supreme court has determined that "when 'the jury appears to be confused about a legal issue, and the resolution of the question is not apparent from an earlier instruction, the trial judge has a "responsibility to give the jury the required guidance by a lucid statement of the relevant legal criteria."'" *State v. Ramirez*, 178 Ariz. 116, 126, 871

P.2d 237, 247 (1994), *quoting Des Jardins v. State,* 551 P.2d 181, 190 (Alaska 1976).

¶14 Gonzales further contends that the jury in his case was confused and that its having found him guilty of child abuse while also finding the aggravating factors unproven demonstrates it did not understand the charge. But the mere possibility of a compromise or inconsistent verdict is not a sufficient ground for reversal. *State v. Van Winkle*, 149 Ariz. 469, 471, 719 P.2d 1085, 1087 (App. 1986); *see also State v. Zakhar*, 105 Ariz. 31, 32-33, 459 P.2d 83, 84-85 (1969) (consistency unnecessary; inconsistent verdicts may be result of leniency); *State v. DiGiulio*, 172 Ariz. 156, 162, 835 P.2d 488, 494 (App. 1992) ("There is no constitutional requirement that verdicts be consistent."); *State v. Parsons*, 171 Ariz. 15, 15-16, 827 P.2d 476, 476-77 (App. 1991) (no error in jury finding aggravated assault with deadly weapon but finding state failed to prove dangerous nature of offense). "Well-settled Arizona law permits inconsistent verdicts." *Gusler v. Wilkinson*, 199 Ariz. 391, ¶ 25, 18 P.3d 702, 707 (2001).

¶15 Furthermore, we cannot say that the trial court's instruction—that the jury consider the evidence it had been provided in light of the law on which it had been instructed—was insufficient. Gonzales has cited no authority to suggest that a jury cannot consider a defendant's guilt based on a theory other than that argued by the state, so long as evidence supports it. And, by directing the jury to consider only the evidence presented and the legal instructions given, the court properly circumscribed the jury's deliberations. Likewise, we cannot say Gonzales has established prejudice resulting from the instruction, in view of the evidence presented.

Disposition

¶16 We affirm Gonzales's conviction and sentence.